No. 19-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SALVATORE ZICCARELLI

Plaintiff–Appellant,

v.

THOMAS J. DART, WYLOLA SHINNAWI, and COOK COUNTY, ILLINOIS,

Defendants–Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Illinois
Case No. 1:17-cv-03179, Hon. Ronald A. Guzmán

REPLY BRIEF FOR APPELLANT SALVATORE ZICCARELLI

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I. Defendants interfered with Ziccarelli's FMLA rights by discouraging him from using FMLA leave.

A. Interference requires only discouragement, not denial.

The FMLA makes it unlawful for employers "to *interfere* with, restrain, *or* deny the exercise of or the attempt to exercise, any right provided [under the FMLA]." 29 U.S.C. § 2615(a)(1) (emphasis added). "[T]he district court erred by holding that an employer must deny an employee's FMLA leave, rather than interfere with the employee's use or attempted use of FMLA leave." Sec'y of Labor Br. 1. As the broad statutory language indicates—and implementing regulations and all authority confirm—discouraging an employee from taking FMLA leave is enough for an employer to interfere. *See* Opening Br. 11-14.

Defendants nonetheless contend that "to interfere" really means "to deny." *See* Resp. Br. 10-11. But they do not engage in statutory interpretation. They do not grapple with the FMLA's text, which designates "interfere" and "deny" as separate ways that an employer can violate the Act. *See* 29 U.S.C. § 2615(a)(1). Nor do they acknowledge that the implementing regulations include "discouraging an employee from using such leave" as an example for how an employer could interfere. 29 C.F.R. § 825.220(b). Defendants admit that *Preddie v. Bartholomew Consolidated School Corp.*, 799 F.3d 806 (7th Cir. 2015), stated that interference includes "discouraging an employee from using such

leave," but don't explain why that interpretation doesn't govern here. Resp. Br. 8 (quoting *Preddie*, 799 F.3d at 818).

Instead, Defendants suggest that interference demands "a concrete negative job consequence." Resp. Br. 9. That's simply not true. Under the Act's implementing regulations, an employer can interfere by "refusing to authorize FMLA leave" or "discouraging an employee from using such leave." 29 C.F.R. § 825.220(b). Moreover, Defendants' cited cases discuss the FMLA's prejudice inquiry, not the definition of interference. *See* Resp. Br. 9-10. The requirement that a plaintiff show prejudice "arising from the interference" has nothing to say about whether the employer interfered with its employee's rights in the first place. *Waggel v. George Washington Univ.*, 957 F.3d 1364, 1376 (D.C. Cir. 2020); *Thompson v. Kanabec Cnty.*, 958 F.3d 698, 705-06 (8th Cir. 2020) (noting the requirements are separate).

B. Defendants discouraged Ziccarelli.

Discouragement occurs where an employer's communications with an employee "convey the message that" if the employee exercised his FMLA rights, "there would be adverse consequences." *Preddie*, 799 F.3d at 818. Defendants do not dispute that Shinnawi threatened Ziccarelli with adverse consequences. They nonetheless argue that her threat wasn't interference because she "merely told him that he did not have sufficient FMLA time to cover all eight weeks." Resp. Br. 12. But that's not all that Shinnawi said to Ziccarelli, and, on this record, a finder of fact could conclude that Defendants interfered. Shinnawi told Ziccarelli that if he took "more FMLA," he would

be "disciplined." App. 27A; *see id.* 46A, 211A. She then refused to answer Ziccarelli's follow-up questions, *see id.* 46A-47A, 49A, 214A, and referred to the Sheriff Office's "attendance review" when Ziccarelli asked whether he would be disciplined or discharged for using his FMLA leave, *id.* 46A. Viewing all the facts and drawing all reasonable inferences in Ziccarelli's favor—as the district court was required to do on summary judgment—Shinnawi's repeated invocation of discipline, along with her unhelpful and curt replies to Ziccarelli's questions, conveyed that Ziccarelli would be punished for taking the FMLA leave to which he was entitled. *See Burnett v. LFW Inc.*, 472 F.3d 471, 477 (7th Cir. 2006).

C. Ziccarelli was prejudiced by Defendants' discouragement.

To the extent that Defendants suggest that Ziccarelli was not prejudiced by Defendants' discouragement, they are mistaken. *See* Resp. Br. 9-11. To prove prejudice, an employee must show "consequential harm" resulting from the FMLA violation. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). Our opening brief explains (at 15) that prejudice exists when an employee would have structured leave differently absent the discouragement. *See* 29 C.F.R. § 825.301(e); *Lutes v. United Trailers, Inc.*, 950 F.3d 359, 368 (7th Cir. 2020).

After Shinnawi's discouragement, Ziccarelli involuntarily retired to seek the medical treatment he needed. He lost his salary, health insurance, and other benefits. *See* App. 38-39A, 185A-86A. Nothing in the record suggests that Ziccarelli would have quit had he believed he could take the medical leave to which he was entitled and that

his physician had prescribed. Therefore, it would be more than reasonable for a finder of fact to infer that Ziccarelli would have stayed on the job and used the FMLA and paid sick leave to which he was entitled had Shinnawi not threatened him with discipline. *See id.* 97A, 211A, 216A.

II. Defendants also interfered by failing to provide Ziccarelli with FMLA-required information after he notified them of his needed leave.

Failure to provide employees with adequate information about their rights constitutes interference under the FMLA. *See* 29 C.F.R. § 825.300-301. The employer's affirmative duty to provide that information attaches when an employee has "ma[de] the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c).[1]

A. Even if Defendants did not affirmatively waive their argument to the contrary, Ziccarelli notified them of his entitlement to FMLA leave.

Defendants acknowledged below that Ziccarelli provided them with notice of his entitlement to FMLA leave. *See* Defs. Mem. in Support of Mot. Summ. J. at 7 (ECF 30) ("Defendants do not dispute the first four elements" of Ziccarelli's interference

[1] Defendants appear to suggest (but do not expressly contend) that Ziccarelli forfeited this interference argument. *See* Resp. Br. 13. Ziccarelli forfeited nothing. Ziccarelli argued to the district court that Defendants unlawfully interfered with his FMLA rights. *See* Pl. Resp. to Defs. Mot. for Summ. J. at 6 (ECF 42). In any event, Defendants have "chose[n] not to argue" forfeiture, "so there is a waiver" of any potential forfeiture, and this Court "must treat the issue on the merits." *Geva v. Leo Burnett Co., Inc.*, 931 F.2d 1220, 1225 (7th Cir. 1991).

claim, including that "he provided sufficient notice of his intent to take leave."). They have thus waived any contrary argument. *See* Resp. Br. 13-14.

In any case, Ziccarelli notified the Defendants. It isn't difficult for an employee to place his employer on notice. "He doesn't have to write a brief demonstrating a legal entitlement" to FMLA leave. *Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950, 953 (7th Cir. 2004). Rather, "the employee's duty is merely to place the employer on notice of a probable basis for FMLA leave." *Id.* Put differently, if an employee gives his "employer enough information to establish probable cause … to believe he is entitled to FMLA leave," that "trigger[s] the employer's duty." *Id.* For example, in *Righi v. SMC Corp.*, 632 F.3d 404 (7th Cir. 2011), an employee met the Act's notice requirement by sending an email to his supervisor that "mentioned his mother's diabetic coma." *Id.* at 409. Similarly, this Court held that a reasonable jury could find that an employee with a broken rib provided adequate notice by leaving a voicemail that "report[ed] his absence and noted his rib as the reason." *Lutes v. United Trailers, Inc.*, 950 F.3d 359, 365-66 (7th Cir. 2020).

Ziccarelli easily clears this low bar. He called the Sheriff Office's FMLA manager, requested FMLA leave for treatment prescribed by his doctor, and indicated how long his leave would last. *See* App. 46A, 211A. Ziccarelli told Shinnawi that he was "very sick, [and his] doctor's orders was for [him] to do this." *Id.* 46A. He had been approved for intermittent FMLA leave for the same conditions in both 2015 and 2016, and Shinnawi herself signed off on the 2015 leave. *Id.* 89A-90A, 94A.

Tellingly, Defendants do not dispute that they had sufficient information to establish probable cause that Ziccarelli was entitled to FMLA leave. *See Aubuchon*, 359 F.3d at 953. They instead fault Ziccarelli for "never complet[ing] an additional FMLA Request form or a Certification of Health Care Provider form documenting the need for the eight weeks of FMLA he was seeking." *Id.* at 14. It's true that employers can require employees to comply with certain notice procedures. *See* 29 C.F.R. § 825.302(d). But Defendants never squarely argue that Ziccarelli violated Sheriff's Office policy, perhaps because Defendants themselves discouraged Ziccarelli from moving forward with his FMLA request. *See* App. 4A, 46A, 248A. Under this Court's precedent, Ziccarelli's call to the Sheriff Office's FMLA Manager notified Defendants of his intent to take leave, thereby triggering Defendants' obligations under the Act.

B. Defendants never issued Ziccarelli an FMLA designation notice or responded to his questions, and they don't argue otherwise.

Because Ziccarelli provided notice of his intent to take leave, the FMLA imposed affirmative duties on the Sheriff's Office. *First*, the Sheriff's Office was required to verify his request for medical leave and notify him in writing, within five business days of his request, "of the number of hours, days, or weeks that [would] be counted against [his] FMLA leave entitlement." 29 C.F.R. § 825.300(d)(6); *see id.* § 825.300(d)(1), (4). That designation notice should have informed Ziccarelli about the relationship between his remaining unpaid FMLA leave, paid FMLA leave, and the exhaustion of his benefits. *See id.* §§ 825.300(d)(1), 825.300(d)(5). *Second*, Defendants were "expected to

responsively answer questions from [Ziccarelli] about [his] rights and responsibilities under the FMLA." *Id.* § 825.300(c)(5). Failure to satisfy these requirements "may constitute an interference." *Id.* §§ 825.300(e), 825.301(e).

Defendants offer no argument that they complied with these affirmative duties. Instead, they blame Ziccarelli for not understanding his FMLA rights without their guidance. *See* Resp. Br. 14. But Ziccarelli's "apparent confusion" over his FMLA rights, *id.*, shows why the FMLA imposes these affirmative duties on employers. Employees "may not be aware that their leave is protected under the FMLA." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 98 (2002) (O'Connor, J., dissenting). The FMLA "ensure[s] that employers allow their employees to make informed decisions about leave" by requiring them to inform their employees about their rights. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 144 (3d Cir. 2004) (quoting *Nusbaum v. CB Richard Ellis, Inc.*, 171 F. Supp. 2d 377, 385-86) (D.N.J. 2001)). Because of Defendants' refusal to comply with their affirmative duties—that is, because of Defendants' interference—Ziccarelli couldn't make an informed decision here.

III. Ziccarelli was constructively discharged.

The FMLA's anti-retaliation provision protects employees against two forms of constructive discharge. *See* 29 U.S.C. § 2615(a)(2). In the first form, an employee resigns from a work environment made intolerable by discriminatory harassment. *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010). That discriminatory harassment must be "even more egregious than that required for a hostile work environment

because employees are generally expected to remain employed while seeking redress." *Id.* In the second form, an employee resigns from a work environment made intolerable because his "employer made reasonably clear" that if he did not resign, he would be terminated. *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002).

Defendants, like the district court, confuse the two types of constructive discharge. *See* D. Ct. Op. at 2-3. Defendants are correct that, under both forms of constructive discharge, the employee must show that his working conditions became intolerable. *See* Resp. Br. 16; *Chapin*, 621 F.3d at 679. But the requisite intolerability is defined differently under each. Because Ziccarelli proceeds under the second form of constructive discharge, he need show only that "a reasonable employee standing in [his] shoes would have believed that had []he not resigned, []he would have been terminated." *Univ. of Chi. Hosps.*, 276 F.3d at 332.

A jury could conclude that if Ziccarelli had exercised his FMLA rights and taken the medical leave he needed, Defendants would have terminated him. Shinnawi told Ziccarelli "not [to] take any more FMLA," threatened that he "would be subject to discipline" if he took medical leave, and stated that "action would be taken against [him]" if he took time off that was not "explicitly approve[d]." App. 4A, 46A, 248A. And, as our opening brief demonstrates (at 25-26), the Sheriff's Office makes no secret of its antagonism towards employees who take FMLA leave.

CONCLUSION

The judgment of the district court should be reversed and remanded for a trial on the merits of Ziccarelli's interference and retaliation claims.

Respectfully submitted,

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February 4, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 2,060 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5), the type-style requirements of Rule 32(a)(6), and the requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, set in Garamond font in 14-point type.

/s/ Hannah Mullen
Hannah Mullen

CERTIFICATE OF SERVICE

I certify that on, February 4, 2021, this appearance and disclosure form was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Hannah Mullen
Hannah Mullen